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No. 86-1148

In The
Supreme Court of the United States
October Term, 1986

CAROLYN V. HOGAN,

Petitioner,

V.

MYRTLE SPRINGS REVERTED INDEPENDENT SCHOOL DISTRICT and WILLS POINT INDEPENDENT SCHOOL DISTRICT,

Respondents.

On Writ of Certiorari to the Supreme Court of the State of Texas

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION RESTATED

Whether a public employer's nonrenewal of a term contract for part-time administrative duties after notice of the reasons therefor and a hearing violates the procedural due process guarantees of the fourteenth amendment to the United States Constitution.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents Myrtle Springs Reverted Independent School District and Wills Point Independent School District respectfully request that this Court deny the petition for writ of certiorari for the reasons stated below.

STATEMENT OF JURISDICTION

Respondents believe that there is substantial doubt whether the alleged federal issue in this case was presented to and decided by the Texas state courts. Petitioner pleaded the fourteenth amendment in her pleading filed with the Texas Education Agency, but she did not litigate this issue in the Texas trial court. She contended only that her contract had been breached by a nonrenewal of part-time administrative duties and that she should be awarded mental anguish damages and loss of earning capacity damages for the alleged breach of her employment contract. The Texas Court of Appeals reviewed the trial court's judgment and concluded that the judgment was not based in any respect on procedural due process. The Texas Supreme Court did not disturb this holding. Petitioner pleaded but did not try her claim under the fourteenth amendment, and the Texas state courts did not decide a federal issue. Thus, this Court lacks jurisdiction over this case. If, however, the Court determines that jurisdiction does exist, the petition for writ of certiorari should be denied as will be shown below.

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STATEMENT OF THE CASE

This is a contract nonrenewal case which was tried in the district court of Travis County, Texas, as a breach of contract case under Texas law. Petitioner contended at trial and on appeal that the nonrenewal of her part-time duties was a breach of her employment contract. The opinion of the Texas Court of Appeals, which the Texas

Supreme Court refused to review, identified the issues on appeal to be whether Respondent Myrtle Springs breached Petitioner's employment contract "when it did not renew her part-time principal's position and, if the contract was breached, the proper measure of damages." *Myrtle Springs Reverted Independent School District v. Hogan*, 705 S.W.2d 707, 708 (Tex. App.—Texarkana 1985, writ ref'd n.r.e.). The Court of Appeals' opinion contains many of the facts relevant to this Court's consideration of the petition for certiorari, although the Court of Appeals occasionally incorrectly used the terms "dismissal" and "nonrenewal" interchangeably. The terms, of course, describe two very different acts by an employer and have substantive legal differences and consequences which are significant for this case, which Petitioner now contends to be a procedural due process case.

Respondents take issue with several misstatements and mischaracterizations made by Petitioner in the petition. She repeatedly characterizes her loss of part-time administrative duties as a "dismissal" or as a "removal." Perhaps this characterization is understandable because her attorney must know that only a dismissal during a contract's term implicates the due process clause, but it is a blatant misrepresentation of the record and the undisputed facts of this case.

Respondent Myrtle Springs employed Petitioner for the 1976-77 school year on a ten-month term contract which expired by its own terms at the end of that school year. (PX 9). Petitioner's employment under this term contract for 1976-77 was as a full-time elementary school teacher and as a part-time principal. *Id.* For 1977-78 Respondent Myrtle Springs offered Petitioner a teacher's

contract, which she refused, but did not renew her part-time administrative duties. (1 SF 164, 167; PX 19 at 406). Respondent Myrtle Springs' Board of Trustees first informed Petitioner of its intention not to renew her administrative duties at its April 11, 1977 meeting, but the Board took no formal action at that meeting. (PX 19 at 407).

At Petitioner's request and before the expiration of her 1976-77 contract, the Board notified her of the reasons for nonrenewal and granted Petitioner a public hearing on May 9, 1977, at which she was represented by counsel and at which she and persons speaking for her defended her position and attempted to refute the reasons for nonrenewal. (PX 19 at 342-43, 407; 1 SF 92-94, 167-71). At the close of this hearing, the Board reconsidered its earlier decision but reaffirmed its intent to offer Petitioner only a teacher's contract for 1977-78. (PX 19 at 397). Most important, Petitioner completed the entire term of her 1976-77 contract. (1 SF 165). In June of 1977, Petitioner had a second hearing to contest her nonrenewal at which she was represented by counsel. (1 SF 170-71; PX 19 at 246-48, 397-402). Petitioner's part-time administrative position was eliminated prior to the beginning of the 1977-78 school year by consolidation of Respondent school districts. (1 SF 165, 167; PX 19 at 402-03. Finally, Myrtle Springs' *discharge* policy required notice of unsatisfactory service by May 1 (PX 19 at 388), but the ***nonrenewal*** policy did not require notice by any specific date, contained no good cause requirement and allowed, but did not require, a hearing before nonrenewal. (PX 19 at 380).

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REASONS WHY THE WRIT SHOULD BE DENIED

There is a substantial question whether Petitioner's alleged due process issue was presented to *and* decided by the state court. Even if it were, the general considerations for Supreme Court review by writ of certiorari, as set out in Rule 17 of the Supreme Court Rules, have not been satisfied. Petitioner relies solely on Rule 17.1(c) in her petition. She claims that the Texas state court decision in this case conflicts with *Cleveland Board of Education v. Loudermill,* 470 U.S. 532 (1985) and other procedural due process decisions of this Court, but as will be shown below, there is no procedural due process issue and no conflict. Petitioner has attempted to create such an issue by misrepresenting and mischaracterizing the record, and this attempt should be rejected for the abuse of the system that it is. There is no conflict between this case and the decisions of this Court. The petition for writ of certiorari is frivolous and should be denied.

Petitioner Hogan represents to the Court that this case presents an issue of constitutional due process under the fourteenth amendment to the United States Constitution, and she correctly cites *Cleveland Board of Education v. Loudermill, supra,* for the proposition that a public employer must give a contract employee notice and an opportunity to be heard prior to *termination* of employment during the contract's term. Respondents did not, however, terminate Petitioner's employment, and the Petitioner's case, stripped of its mischaracterizations, does not present a constitutional issue and should not be reviewed by this Court.

It is undisputed that Respondent Myrtle Springs Reverted Independent School District employed Petitioner Hogan for the 1976-77 school year on a ten-month term contract, and it is equally undisputed that Petitioner served the entire term of her contract for the 1976-77 school year as elementary teacher and part-time principal. Finally, Petitioner admitted at trial that she was given notice and a hearing, at which she was represented by counsel, on May 9, 1977, which was *prior* to the expiration of her contract term. No fourteenth amendment issue is presented by these facts, and Petitioner's mischaracterization of the nonrenewal of her part-time administrative duties as a dismissal or a termination or a removal is not supported by the record.

The very cases cited by Petitioner recognize the well-settled principle that state law determines whether a property right exists. *E.g., Board of Regents v. Roth,* 408 U.S. 564 (1972). *Accord, Bishop v. Wood,* 426 U.S. 341 (1976). Under Texas law applicable in 1977, a public employee employed on the basis of a term contract had no expectation of continued employment beyond the term of the contract.[1] *E.g., Siler v. Brady Independent School District,* 553 F.2d 385 (5th Cir. 1977); *Skidmore v. Shamrock Independent School District,* 464 F.2d 605 (5th Cir. 1972); *Hix v. Tuloso-Midway Independent School District,* 489 S.W.2d 706 (Tex. Civ. App.—Corpus Christi 1972, writ ref'd n.r.e.). In 1977 this was true even if the

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[1] Effective August 31, 1981, the Texas Legislature enacted the Term Contract Nonrenewal Act, TEX. EDUC. CODE ANN. §§ 21.201-.211, which for the first time gave Texas public school teachers and administrators procedural rights prior to nonrenewal of their term contracts.

school district had an express or implied policy, as Petitioner contends Respondent Myrtle Springs did, of automatically renewing the contracts of teachers whose performance was satisfactory. *Id.* Whether a property interest has been created by express or implied contract is a matter of state law, *Bishop v. Wood, supra,* and the sort of tenure Petitioner contends she had by virtue of an automatic renewal provision in a personnel policy or practice did not exist in 1977 as a matter of Texas law. *Siler v. Brady Independent School District, supra; Hix v. Tuloso-Midway Independent School District, supra.* This principle of Texas law recently was reaffirmed twice by the Fifth Circuit Court of Appeals in cases substantially similar to the instant case. *Wells v. Hico Independent School District,* 736 F.2d 243 (5th Cir. 1984), *cert. dismissed,* — U.S. —, 106 S.Ct. 11 (1985); *Burris v. Willis Independent School District,* 713 F.2d 1087 (5th Cir. 1983). Nonrenewal of a term contract in 1977 under Texas law simply does not present a question of federal due process of law, and the Court should not review this case.

Petitioner contends, however, that the personnel policies of Respondent Myrtle Springs created a property interest which entitled her to reemployment for the 1977-78 school year. First, as the cases cited above demonstrate conclusively, any such automatic renewal policy—although Respondents state emphatically that the nonrenewal section of the policy contained no just cause requirement and no automatic renewal provision—was contrary to Texas law and was void. More important, Petitioner received notice of the reasons for her nonrenewal and had an opportunity to refute those reasons at a public hearing, at which she was represented by counsel, prior to the expira-

tion of her contract. This is all the process the fourteenth amendment requires, even for the *termination* of tenured public employment, and certainly no more was required for the nonrewenal of a term contract in 1977. *Cleveland Board of Education v. Loudermill, supra. Accord, Seifert v. Lingleville Independent School District,* 692 S.W.2d 461 (Tex. 1985) (explains the procedural requirements for nonrenewal before and after passage of the Term Contract Nonrenewal Act in 1981).

Petitioner's contention actually is that Respondent's alleged violation of procedures which went beyond the constitutional minimum of notice and a hearing constitutes a separate violation of due process. This contention has been expressly rejected numerous times by the Fifth Circuit Court of Appeals. If the United States Constitution does not require a certain procedure, failure to adhere to that procedure is not a violation of the fourteenth amendment. *United States v. Caceres,* 440 U.S. 741 (1979); *Brown v. Texas A & M University,* 804 F.2d 327 (5th Cir. 1986); *Levitt v. University of Texas at El Paso,* 759 F.2d 1224 (5th Cir. 1985), *cert. denied sub nom., Levitt v. Monroe,* — U.S. —, 106 S.Ct. 599 (1985). Petitioner alleges nothing more than violations of procedures which were over and above the constitutional minimum, and she does not allege facts which constitute a violation of the fourteenth amendment to the United States Constitution.

REQUEST FOR DAMAGES AND DOUBLE COSTS

Rule 49.2 of the Rules of the Supreme Court permits the Court to award a respondent appropriate damages when a petition for writ of certiorari is frivolous. Petitioner and her counsel, in an attempt to avoid the state court's decision on the theory she chose and to avoid well-settled Texas and federal law, have misrepresented the record to this Court and have tried to create a federal issue where none exists. In addition, Petitioner and her counsel have ignored Texas and federal law which clearly demonstrates that her due process contention is frivolous. The petition filed with this Court further multiplied the proceedings in this case unreasonably and vexatiously. Therefore, Respondents respectfully request that they be awarded damages pursuant to Rule 49.2 in an amount equal to their attorneys' fees in responding to this petition and double costs pursuant to Rule 50.7. In addition, Respondents request pursuant to 28 U.S.C. § 1297 that Petitioner's counsel be made liable for the excess costs and attorneys' fees caused by the petition.

CONCLUSION

The petition for writ of certiorari is based on false premises: that Petitioner was terminated from employment and that she litigated a federal due process issue. Petitioner tried this case as a breach of contract case, and the Texas Court of Appeals expressly held that the trial court did not base its judgment on procedural due process. *Myrtle Springs Reverted Independent School District v.*

Hogan, supra, 705 S.W.2d at 711 (Tex. App.—Texarkana 1985, writ ref'd n.r.e.). The Texas Supreme Court did not disturb this holding or the holding of the Court of Appeals that the trial judge improperly awarded loss of earning capacity damages in a breach of contract case. Petitioner did not have a property interest in continued employment in her part-time administrative duties for 1977-78, but even if she did, Respondent Myrtle Springs gave her notice and a hearing to contest her nonrenewal prior to the expiration of her term contract. There is no procedural due process issue presented by this case, and the Texas Supreme Court's decision is not in conflict with any decision of this Court. There are no important national issues which should be decided by this Court. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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